

November 8, 2019

**VIA ELECTRONIC FILING**

Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Washington, D.C. 20554

**Jeffrey E. Rummel**

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Re: **WT Docket No. 19-39**  
**Dynetics, Inc.**  
**Notice of Ex Parte Discussion**  
**And Request for Immediate Action**

Ms. Dortch:

In connection with the pending “Request For Modification Of Freeze” and “Request For Limited Waiver” (collectively the “Requests”) filed by Dynetics, Inc. (“Dynetics”) in this docket, the following is noted:

**Notice of Ex Parte Discussion**

On November 7, 2019, undersigned counsel for Dynetics spoke by telephone with Rebecca Schwartz, Legal Advisor, Wireless Telecommunications Bureau, to inquire about the status of the Commission’s consideration of the Requests. Ms. Schwartz advised that while the Commission was aware of the Requests and that they have “not [been] forgotten”, the Commission does not have any updates or indication of timing with respect to its disposition of the Requests.

No substantive issues (related to the Requests specifically, or to the Docket generally) were identified as reasons for the Commission’s inaction on these pleadings, which were filed 6 months ago. Rather, Ms. Schwartz generally cited the existence of other proceedings addressing adjacent bands, and that NTIA’s report is still pending. In reply, undersigned counsel briefly reiterated several of the points that are discussed in greater detail below, and requested that the Commission immediately turn its attention to Dynetics’ extremely limited requests for relief, for which no substantive opposition exists in the record, in order to mitigate the increased risk to the critical infrastructure community that has been caused by the Freeze.

**Request for Immediate Action****I. The Docket is Complete and In Full Substantive Support of Dynetics' Requests**

Dynetics' Requests were filed six months ago, along with a request for expedited action, and the formal comment period closed in June. Since then, numerous additional ex parte filings have been submitted, all in support of the pending pleadings. This Docket is ripe for immediate Commission action.

Immediate action is warranted in light of the fact that every substantive filing and meeting addressing the public safety issues and the legal standards applicable to the Requests has been in full support of the relief requested, including the following critical points.

- The Freeze (as currently imposed) prevents critical infrastructure operators from complying with long-term sector-specific physical site protection requirements by preventing the non-temporary licensing of state-of-the-art radiolocation technologies in the 3.1-3.3 GHz range.
- The inability of critical infrastructure operators to obtain non-temporary licensing of state-of-the-art radiolocation technologies in the 3.1-3.3 GHz range increases the risk of attack on such critical infrastructure operators. The potentially devastating impact (well beyond “inequitable” or “unduly burdensome”) to the security of critical infrastructure facilities and therefore our nation’s homeland security, is well documented in this Docket and – as recently confirmed by Southern Company Services – presents a current and ongoing substantial threat (See Attachment 1).<sup>1</sup>
- The relief sought in Dynetics' Requests has been extremely narrowly-tailored to address only very specific use-cases (eligible critical infrastructure applicants, operating solely within the confines of their property for the purpose of infrastructure surveillance and protection, operation only on discrete carrier frequencies the number of which would be limited per location, and subject to additional stringent oversight conditions).
- No commenter (or the Commission) has specifically and substantively identified any harm that would be caused to existing or future commercial deployments (or to NTIA’s review), by permitting the filing of the very limited non-temporary applications specified in Dynetics' Requests.
- Dynetics' Requests fully satisfy the separate and independent grounds for expedited relief applicable under Sections 1.3, 1.41, and 1.925(b)(3)(i) and 1.925(b)(3)(ii) of the Commission’s Rules.<sup>2</sup>

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<sup>1</sup> Ex Parte Letter dated September 18, 2019, from Jeffrey L. Sheldon, Counsel for Southern Company Services, Inc.

<sup>2</sup> The only 2 comments filed in opposition to the Requests (by WinnForum and CTIA) relied primarily on erroneous procedural grounds that – as demonstrated by Dynetics – are patently contrary to applicable precedent.

### **Request for Immediate Action**

## **II. Continued Delay is Unreasonable and Completely Inconsistent with the Leadership's Commitment to the Protection of Critical Infrastructure, the Commission's Statutory Mandate and US Homeland Security Policy**

Chairman Pai has clearly stated that “When it comes to our national security, we cannot afford to make risky choices and just hope for the best. We must have a clear-eyed view of the threats that we face and be prepared to do what is necessary to counter those threats.”<sup>3</sup> Indeed, the entire Commission leadership has similarly and consistently confirmed its unwavering commitment to protecting public safety and the nation's infrastructure.<sup>4</sup>

*The Commission's decision to take a “sit back and wait” approach in this case is completely inconsistent with the leadership's express commitment to critical infrastructure and public safety issues and is the essence of a “risky choice” that serves only to increase the likelihood of attack on our nation's infrastructure. Such result is entirely avoidable, yet the Commission is knowingly refusing to timely “do what is necessary to counter those threats.”*

*The Commission's decision to take a “sit back and wait” approach in this case is also completely inconsistent with the Commission's statutory mandate to protect public safety, and the country's homeland security policies.* The Commission's unilateral decision in February to dispense with notice-and-comment procedures when it imposed the Freeze did not in any manner supersede its overriding responsibility to address on an expedited basis the impacts to public safety resulting from the Freeze once the Commission became aware of these issues pursuant to Dynetics' pleadings. In this regard, the DC Circuit Court of Appeals recently emphasized the critical importance of incorporating public safety as an unalterable, statutorily mandated factor in the agency's decision making process.<sup>5</sup>

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<sup>3</sup> Chairman Pai Statement on Executive Order to Protect America's Communications Networks, May 5/15/19 (Accessed at: <https://docs.fcc.gov/public/attachments/DOC-357486A1.pdf>).

<sup>4</sup> E.g., See Commissioner Michael O'Rielly (“...it seems appropriate to touch on why we expend so much energy protecting our national security. Of course, we do so foremost to prevent immediate threats and attacks on our homeland.”) accessed at: <https://www.fcc.gov/document/orielly-remarks-daniel-morgan-graduate-school-natl-security>; Commissioner Brendan Carr (“...unleashing the private sector to build and operate networks means that private companies are also charged with defending critical infrastructure....Strengthening our national security will continue to be a top priority for the FCC. Doing so requires timely, accurate information concerning the threats we face and a holistic discussion of potential responses”) accessed at <https://docs.fcc.gov/public/attachments/FCC-18-42A1.pdf>; Commissioner Jessica Rosenworcel (“... public safety is paramount. In the very first sentence of the Communications Act, Congress instructed the Commission to make available, “to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide radio and communication service” in order to promote the “safety of life and property.”) accessed at <https://docs.fcc.gov/public/attachments/DOC-356850A1.pdf>; Commissioner Geoffrey Starks (“I therefore will approach any matters raising national security concerns with this authority in mind. In any such proceeding, I will review the record before me and independently assess whether the proposed outcome protects the national defense and the safety of life and property”) <https://docs.fcc.gov/public/attachments/DOC-357372A6.pdf>.

<sup>5</sup> As noted by the Court: “Congress created the Commission for the purpose of, among other things, “promoting safety of life and property through the use of wire and radio communications.” 47 U.S.C. § 151. So the Commission is “required to consider public safety by \* \* \* its enabling act.” *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006); see also 47 U.S.C. § 615...” *Mozilla Corp. v. FCC*, No. 18-1051, p. 93 (D.C. Cir. Oct. 1, 2019).

**Request for Immediate Action, cont.**

*The Commission's decision to take a "sit back and wait" approach in this case is also completely inconsistent with long-standing United States homeland security policy. Well before the September 11 attacks, it had "long been the policy of the United States to assure the continuity and viability of critical infrastructures" such as telecommunications, energy, banking and finance, transportation, water systems and emergency services, both governmental and private.*<sup>6</sup> Following 9-11, United States homeland security policy confirmed that "there is critical infrastructure so vital that its incapacitation, exploitation, or destruction, through terrorist attack, could have a debilitating effect on security and economic well-being."<sup>7</sup> Such policy now requires the federal government to "work with critical infrastructure owners and operators" to "take proactive steps to manage risk and strengthen the security and resilience of the Nation's critical infrastructure".<sup>8</sup> The Commission's hands-off approach in this case stunningly fails to secure the necessary lynchpin of this policy – i.e., to ensure that federal agencies support private sector development of technologies and systems capable of providing reliable and effective security, surveillance and deterrence of threats to critical infrastructure, as repeatedly confirmed in the National Infrastructure Protection Plan<sup>9</sup> and a variety of other<sup>10</sup> directives.<sup>11</sup>

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<sup>6</sup> Presidential Decision Directive/NSC-63, PDD-63, Sections I and II (May 22, 1998) (accessed at <https://fas.org/irp/offdocs/pdd/pdd-63.htm>).

<sup>7</sup> See, e.g., Dynetics' Request For Limited Waiver at 2-3, citing Homeland Security Presidential Directive/Hspd-7, "December 17, 2003, Section 4 ("HSPD-7") (accessed at: <https://www.dhs.gov/homeland-security-presidential-directive-7>).

<sup>8</sup> Presidential Policy Directive – PPD-21 -- Critical Infrastructure Security and Resilience, February 12, 2013, P.2 ("PPD-21") (accessed at <https://www.dhs.gov/sites/default/files/publications/PPD-21-Critical-Infrastructure-and-Resilience-508.pdf>).

<sup>9</sup> See National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience, United States Department of Homeland Security (accessed at <https://www.dhs.gov/sites/default/files/publications/national-infrastructure-protection-plan-2013-508.pdf>) (the "NIPP 2013").

<sup>10</sup> HSPD-7 at Section 5 ("...strategic improvements in security can make it more difficult for attacks to succeed and can lessen the impact of attacks that may occur.") and Section 8 ("Federal departments and agencies will identify, prioritize, and coordinate the protection of critical infrastructure and key resources in order to prevent, deter, and mitigate the effects of deliberate efforts to destroy, incapacitate, or exploit them."); PPD-21 at 2 ("These efforts shall seek to reduce vulnerabilities, minimize consequences, identify and disrupt threats..."); NIPP 2013 at 15 ("The national effort to strengthen critical infrastructure security and resilience depends on the ability of public and private sector critical infrastructure owners and operators to make risk-informed decisions on the most effective solutions available when allocating limited resources in both steady-state and crisis operations. Therefore, risk management is the cornerstone of the National Plan...") and 18 (The activities of the public/private partnership must include "[i]mplement[ing] intrusion detection or intrusion protection systems on sensitive or mission-critical networks and facilities to identify and prevent unauthorized access and exploitation.")

<sup>11</sup> It is also noted that the Administrative Procedure Act itself commands that agency actions must be completed "within a reasonable time," 5 U.S.C. §706(1). While a number of factors can be evaluated in order to determine whether an agency's delay is egregious it is clear that "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *TRAC v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (citing *PCHRG v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984)). In light of the facts and issues presented in this Docket that directly impact on the health and welfare of the American public, continued delay threatens to run afoul of these most basic procedural requirements, as well.

**Request for Immediate Action, cont.**

**III. Continued Delay Based on the Factors Cited by the Commission is Completely Inconsistent with the Relevant Facts**

*The Commission's decision to take a "sit back and wait" approach based on the existence of other proceedings in adjacent frequency ranges and the pendency of NTIA's report is also completely inconsistent with the relevant facts, as follows:*

- Other Pending Proceedings: If anything, other pending proceedings before the Commission serve only to highlight the concerns addressed by Dynetics in this Docket, in that they support the need for immediate Commission action to protect critical infrastructure. For example, with respect to the ongoing consideration of the 6 GHz band, the Commission has been repeatedly warned that harm to utilities and other critical infrastructure industries must be avoided at all costs, in order to ensure "the safe, reliable and secure delivery of essential services."<sup>12</sup> Further, a bipartisan coalition of United States Senators has just this week similarly confirmed that the Commission must prioritize the protection of critical infrastructure, stating "Given the criticality of electricity, water, and natural gas services to our economy and lifestyles, it is bad policy to put these systems at risk."<sup>13</sup> In addition, just last month Chairman Pai confirmed that regardless of any desire to widely deploy commercial services, critical infrastructure operators such as electrical utilities "need to be protected" and that "you've got my guarantee that I will work...to ensure that that happens."<sup>14</sup> Indeed, one of the most prominent new proceedings about to be initiated is based entirely on the premise that "It is ... vital that we protect our networks from national security threats"<sup>15</sup> and that "the Commission must do all it can within the confines of its legal authority to address national security threats, and that our actions, along with those taken by other Executive Branch agencies, will go far in securing our nation's critical telecommunications infrastructure."<sup>16</sup>

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<sup>12</sup> See e.g., Ex Parte Letter from Brett Kilbourne, Utilities Technology Council, to Marlene H. Dortch, November 5, 2019 (ET Docket No. 18-295, WC Docket No. 19-126; WC Docket No. 10-90 and WC Docket No. 17-84).

<sup>13</sup> Letter dated November 5, 2019 to Chairman Pai, from United States Senators Jim Risch, Mike Crapo, James Inhofe, James Lankford, Mazie Hirono, Joe Manchin III, Shelley Moore Capito, Kevin Cramer, Dianne Feinstein, John Kennedy, David Perdue, and Angus King.

<sup>14</sup> FCC Chairman Pai, Excerpted from Transcript of October 17, 2019, Hearing of Senate Appropriations Committee, Financial Services and General Government Subcommittee Hearing to Conduct Oversight of the FCC Spectrum Auctions Program.

<sup>15</sup> FACT SHEET – "Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs", WC Docket No. 18-89.

<sup>16</sup> Circulation Draft - Report and Order, Order, and Further Notice of Proposed Rulemaking, FCC-CIRC1911-01, WC Docket No. 18-89 (accessed at <https://docs.fcc.gov/public/attachments/DOC-360522A1.pdf>).

**Request for Immediate Action, cont.**

- The Pending NTIA Report: In imposing the Freeze, the Commission confirmed that waiver requests would be entertained.<sup>17</sup> As such, Dynetics promptly submitted its Requests, which were uniformly supported by substantive technical and legal arguments, and numerous ex parte presentations and filings. The Commission has an obligation to substantively review these arguments, in that waiver requests “stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a “hard look.””<sup>18</sup> Notwithstanding its general obligation to closely review waiver requests, and it being presented in this specific case with a one-sided Docket that raises serious issues describing increased threats to the nations critical infrastructure, the Commission is apparently not taking a “hard look” at the Requests. Rather, it has opted to take a “sit back and wait” approach in part because NTIA has not yet submitted its report addressing potential commercial sharing possibilities for future 5G deployments.

As an initial matter, the tangible, serious and urgent public interest considerations presented in the Requests, combined with the extremely limited relief that would apply only to a small subset of entities currently eligible for Part 90 radiolocation licensing, on its face clearly outweighs the marginal value of prohibiting all non-temporary licensing in the lower 3 GHz range in support of theoretical future commercial deployments which have not yet even been authorized under existing rules. Indeed, given the balancing of these interests, the need for immediate Commission action to grant the limited relief requested by Dynetics exists whether or not NTIA might in fact still be analyzing the 3.1-3.45 GHz range, and whether or not NTIA may ultimately recommend the 3.1-3.45 GHz range for commercial sharing in the future.

Having said that, all available and reliable evidence confirms that active consideration of potential sharing in the 3 GHz band in response to Congress’ directive is clearly targeted on the upper portion of the range – namely 3.45-3.55 GHz – not the 3.1-3.45 GHz range addressed in Dynetics’ pleadings. As recently confirmed by Commissioner O’Rielly “we shouldn’t expect any substantive work on 3.1 to 3.45 GHz prior to the preparation of the report [due to Congress by March 2020]”.<sup>19</sup> This is consistent with NTIA’s statements made directly to Dynetics many months ago, namely that no additional frequencies had been identified by NTIA for alternative use beyond the limited 3450-3550 MHz frequency range previously identified in February 2018,<sup>20</sup> and NTIA is not considering the 3100-3450 MHz range for alternative use for inclusion in the report due in March

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<sup>17</sup> *Temporary Freeze on Non-Federal Applications in the 3100-3550 MHz Band*, WT Docket No. 19-39 (DA 19-105), n.5 rel. February 22, 2019.

<sup>18</sup> *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>19</sup> “Remarks of FCC Commissioner Michael O’Rielly Before the 8TH Annual Americas Spectrum Management Conference”, September 24, 2019 accessed at <https://docs.fcc.gov/public/attachments/DOC-359839A1.pdf>.

<sup>20</sup> “NTIA Identifies 3450-3550 MHz for Study as Potential Band for Wireless Broadband Use”, David J. Redl (Feb. 26, 2018).



2020. Thus, while further active and substantive study in other bands (including but not limited to the 3.1-3.45 GHz range) may be required at some undefined time in the future, it is patently against the public interest to continue to freeze non-temporary licensing in such bands based on a theoretical possibility and uncertain timetable of future active review.

While the Commission states that it has not forgotten the Requests, its actions speak louder than its words. Is the Commission actually “prepared to do what is necessary” as it claims it must do in every instance to counter threats to public safety, or has it forgotten its promise to the citizenry? If the next attack on critical infrastructure occurs while the Freeze continues to prohibit additional long-term licensing in the lower 3 GHz range, the Commission’s failure to act will certainly not be forgotten. After many months, it is time for the Commission to do what is necessary, and grant the limited relief requested in this proceeding.

Sincerely,

*/s/ Jeffrey E. Rummel*

Jeffrey E. Rummel  
Attorney for Dynetics, Inc.

cc: (via email):

Aaron Goldberger, Acting Wireless & International Advisor for Chairman Ajit Pai  
Erin McGrath, Legal Advisor, Wireless, Public Safety and International for Commissioner Michael O’Rielly  
Will Adams, Legal Advisor to Commissioner Brendan Carr  
Umair Javed, Legal Advisor, Wireless and International, for Commissioner Jessica Rosenworcel  
William Davenport, Chief of Staff and Legal Advisor for Wireless for Commissioner Geoffrey Starks  
Rebecca Schwartz, Legal Advisor, Wireless Telecommunications Bureau  
Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau  
Mike Regiec, Associate Chief, Mobility Division, Wireless Telecommunications Bureau  
Paul Powell, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau

**Attachment 1**

Ex Parte Letter dated September 18, 2019,  
from Jeffrey L. Sheldon, Counsel for Southern Company Services, Inc.





September 18, 2019

Via Electronic Filing in ECFS

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Ex Parte

Re: Dynetics, Inc. Request for Modification of Temporary Freeze on Non-Federal Applications in the 3100-3550 MHz Band; and  
Dynetics, Inc. Request for Limited Waiver of Temporary Freeze on Non-Federal Applications in the 3100-3550 MHz Band  
WT Docket No. 19-39

Dear Ms. Dortch:

Southern Company Services, Inc., on behalf of itself and its operating affiliates (collectively “Southern”), submits this statement in support of the July 8, 2019, letter from Dynetics, Inc., requesting prompt grant of its requests for limited relief from the temporary licensing freeze in the 3100-3550 MHz band.<sup>1</sup> Southern agrees that prompt action is warranted in the interest of homeland security, protection of critical infrastructure, and maintenance of reliable electric service to the public.

The temporary freeze on non-federal applications in the 3100-3550 MHz band was adopted and made effective on February 22, 2019.<sup>2</sup> On May 17, 2019, Dynetics submitted separate requests for modification of the licensing freeze and for waiver of the freeze. Dynetics explained that the licensing freeze was preventing utilities and other critical infrastructure operators from deploying sophisticated security technologies that use radar operating in the 3100-3300 MHz band.

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<sup>1</sup> *Ex parte* submission of Dynetics, Inc., in WT Docket No. 19-39 (filed July 8, 2019).

<sup>2</sup> *Temporary Freeze on Non-Federal Applications in the 3100-3550 MHz Band*, WT Docket No. 19-39, 34 FCC Rcd 19 (WTB 2019).



Southern filed Comments and Reply Comments in support of Dynetics' requests for targeted relief from the licensing freeze in the 3100-3300 MHz band.<sup>3</sup> Southern described the national concern with physical security of the bulk electric system and the Federal Energy Regulatory Commission's ("FERC's") adoption of a Critical Infrastructure Protection ("CIP") standard, "CIP-014-2 – Physical Security," requiring each transmission system operator to implement a documented physical security plan. Southern explained how it spent over one year evaluating potential security systems, and how it identified ground-based radar as a very effective solution to deter, detect, delay, assess, communicate and respond to potential physical threats, as required by CIP-014-2. Southern's affiliates, Georgia Power Company and Alabama Power Company, have installed Dynetics systems at about 32 facilities so far, with plans to install dozens more over the next few years.

The licensing freeze at 3100-3550 MHz brought a halt to Southern's deployment of Dynetics security systems at other critical facilities, and it created uncertainty as to when Southern will be able to resume implementation of its security plans. As Southern explained in its earlier filings, these intrusion detection systems require long lead times for planning, licensing, installation, testing and integration with existing security monitoring systems. Thus, even when the freeze is lifted there will be further delay until Southern is able to make its new systems fully operational.

There is growing need for enhanced physical security to protect the nation's critical infrastructure and electric generation and transmission systems in particular. The Electricity Information Sharing and Analysis Center ("E-ISAC"), operated by the North American Electric Reliability Corporation ("NERC") in collaboration with the U.S. Department of Energy ("DOE"), analyzes and shares data on cyber and physical threats to the nation's interconnected power grid. In its recently-published End of Year Report for 2018, E-ISAC noted significant increases in reported incidents of theft and gunfire at electric transmission facilities.<sup>4</sup> Theft and vandalism can do more than cause power outages: they can also create hazards to employees and the public.

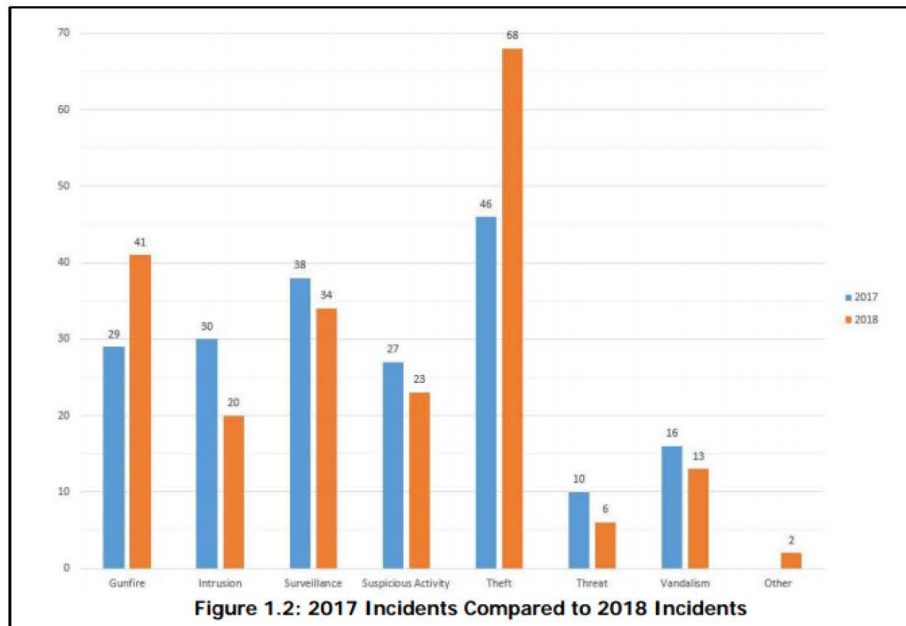
The chart on the next page shows the number of incidents that were voluntarily reported to E-ISAC in 2017 and 2018, categorized by the major physical threats to the electric grid: intrusions, suspicious surveillance, other suspicious activity, theft (primarily of copper), threats (*e.g.*, bomb threats and activist threats), vandalism, and gunfire:<sup>5</sup>

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<sup>3</sup> Comments of Southern Company Services, Inc., filed June 12, 2019, and Reply Comments of Southern Company Services, Inc., filed June 24, 2019, in WT Docket No. 19-39.

<sup>4</sup> Electricity Information Sharing and Analysis Center, *End of Year Report: January 1 - December 31, 2018*; available at <https://www.wecc.org/Administrative/TLP%20Green%20E-ISAC%20End%20of%20Year%20Report.pdf>

<sup>5</sup> *Id.*, at 6.



A recent report from the Congressional Research Service (“CRS”) on electric grid security also noted that a combined cyber and physical attack on the grid could have devastating consequences due to the cost and vulnerability of critical components.<sup>6</sup> The CRS report explained that physical attacks on critical high-voltage transformers could potentially cause long-lasting power outages because these transformers are very large, are difficult to move, and can take months or years to be replaced due to their size and unique specifications.

<sup>6</sup> Richard J. Campbell, Congressional Research Service, R45312, *Electric Grid Cybersecurity* (2018), at 6-7. <https://crsreports.congress.gov/product/pdf/R/R45312/2>.



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For all of the foregoing reasons, as well as those cited in Southern's earlier-filed Comments and Reply Comments, Southern supports Dynetics' request for prompt grant of its Request for Modification of Temporary Freeze, or, in the alternative, grant of a blanket waiver for license applicants meeting the conditions suggested by Dynetics in its Request for Limited Waiver.

Very truly yours,

*/s/ Jeffrey L. Sheldon*

Jeffrey L. Sheldon  
Counsel for Southern Company Services, Inc.